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Supreme Court, U.S.
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No. 96-43

In The

Supreme Court of the United States

October Term, 1995

DAVID L. WILKINSON,

Petitioner,

v.

LEGAL SERVICES CORPORATION
AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF LEGAL SERVICES CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit correctly applied the doctrine of constitutional estoppel in holding that the Legal Services Corporation's inspector general was estopped to challenge the authority of the Corporation's board of directors in voting not to renew his written employment contract, ostensibly because its members were appointed under the recess appointments clause, where the inspector general (1) was charged by law with monitoring the corporation's functions and reporting directly to the board of directors; (2) for nearly two years knowingly served a board whose members were appointed under the recess appointments clause; and (3) repeatedly requested and received from that board salary increases, benefits and operating funds.

CORPORATE AFFILIATION STATEMENT

Respondent Legal Services Corporation has no parent companies or subsidiaries.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Legal Services Corporation requests that the petition of David L. Wilkinson for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit be denied.

COUNTERSTATEMENT OF THE CASE

The Legal Services Corporation ("LSC") is a private, non-profit, tax-exempt corporation created by Congress. Its mission is to provide financial support throughout the United States for legal assistance in non-criminal proceedings and matters to persons unable to afford an attorney. LSC is governed by an eleven-member board of directors (the "board") appointed by the President and confirmed by the Senate. Directors serve three-year terms and, when a director's term expires, he or she continues to serve under a "holdover" provision until a successor has been "appointed and qualified." 42 U.S.C. §§ 2996b, 2996c(a) and 2996c(b).

History of Recess Appointments to the Board.

Throughout its existence, LSC has had directors appointed to its board under the recess appointment clause of the Constitution. This practice, until very recently, was endorsed by all three branches of the federal government.

President Carter made the first recess appointments in 1978, a group of five directors who subsequently were

confirmed for regular terms by the Senate. They remained in office after the expiration of their terms under the LSC Act's "holdover" provision. In 1981, President Reagan replaced them with a slate of recess-appointees. The Carter "holdovers" filed suit to prevent the Reagan recess-appointees from taking office, contending the LSC Act did not permit recess appointments. The United States District Court for the District of Columbia rejected that argument in *McCalpin v. Dana* (D.D.C. Oct. 5, 1982).[1] While *McCalpin* was on appeal, the Reagan recess-appointees were nominated for regular terms and confirmed by the Senate, which mooted the appeal. *McCalpin v. Dana*, 776 F.2d 535 (D.C. Cir. 1985). After completing their regular terms, the Reagan directors remained in office as "holdovers," until they were replaced by President Bush's recess-appointees in November 1989 and January 1990. Thereafter, the Reagan directors relinquished their offices without challenge, and permitted the governance of LSC to be transferred to a board comprised of Bush recess-appointees (the "1990 recess appointments board"). The members of the 1990 recess appointments board were nominated for regular terms, but when the Senate failed to act on their nominations, they again received recess appointments in January 1991 (the "1991 recess appointments board"). The Bush recess-appointees

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[1] In reaching its decision, the district court relied upon *Staebler v. Carter*, 464 F. Supp. 585 (D.D.C. 1979), which also upheld the validity of recess appointments. No contrary decision on recess appointments would appear, generally, until *Mackie v. Clinton*, 827 F. Supp. 56 (D.D.C. 1993), and none would appear with respect to LSC until the district court's 1994 decision in this case.

remained in office without Senate confirmation, until they were replaced by President Clinton's confirmed appointments in 1993. (J.A. 80-83.)[2]

During this period, Congress considered the issue of recess appointments to LSC's board on several occasions, including a bill to amend the LSC Act expressly to prohibit recess appointments. Congress did not enact that bill, and it continued to fund and to maintain oversight of LSC throughout its existence without regard to the presence of recess appointees on its boards. (J.A. 113-119.)[3]

Wilkinson's Service to the Recess Appointments Boards.

In 1988, Congress mandated that LSC have an inspector general. On August 17, 1989, LSC appointed David L. Wilkinson as its first inspector general under a written contract of employment. Under paragraph 6 of the contract, LSC had the option of extending his employment

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[2] Citations refer to the joint appendix filed by the parties with the D.C. Circuit ("J.A.") and the appendix to the petition for writ of certiorari ("A").

[3] For example, in March 1978, when President Carter's recess appointees to the board were presented to the Senate, Senator Javits expressed concern that the President could not make recess appointments to the board because its members may not be "officers" of the United States. He placed into the record a formal opinion by the Justice Department stating that it was within the President's power to make recess appointments to the board, and an analysis of the opinion by the Library of Congress indicating that there were serious questions on the matter and that "[r]esolution . . . may require either clearer guidance from Congress or the Courts." (124 Cong. Rec. 7690 (1978)).

for one-year increments, beginning on September 5, 1991. Paragraph 6 provided that, "[i]n the event either party shall not desire such an extension, notice must be given to the other party by March 5, 1991 . . . " (J.A. 125.)

At the time of Wilkinson's appointment in August 1989, LSC was governed by the Reagan "holdover" directors. By November 1989, however, the first of President Bush's recess appointments had been made, and by January 1990, the 1990 recess appointments board had been appointed. Wilkinson, who was aware of the recess appointments, would spend the next nineteen of his twenty-four months as inspector general – eighty percent of his tenure – serving and reporting to recess appointments boards. Despite a statutory obligation to "investigate" and "report" "problems and deficiencies, and the need for corrective actions" to LSC, as well as a self-professed interest in the operations of the board itself, Wilkinson consistently considered and treated the recess appointments boards as the valid and authoritative "head" of LSC and never once raised the issue of the validity of recess appointments in any official communication or report to the boards, Congress, or anyone else until he was out of office and engaged in this lawsuit. (5 U.S.C. app. 3 §§ 2 and 4(a)(5); J.A. 80-83, 242-247, 252, 304, 335-336, 338-339.)

Wilkinson's Requests For and Receipt of Benefits From The Recess Appointments Boards.

From the outset of his tenure, Wilkinson felt strongly that LSC's board of directors, as distinguished from its president, was the organization's "head" for purposes of his reporting responsibilities under the Inspector General

Act. In an unsolicited June 1990 legal opinion, Wilkinson so advised the board, at a time when it was composed entirely of President Bush's recess appointees. (J.A. 127-131.)[4] Consistent with his view, Wilkinson delivered his official reports, recommendations, and requests for action related to his salary and benefits, official duties, and operation of the Office of Inspector General ("OIG"), to recess appointments boards, without ever questioning their power to receive or act on them. (J.A. 132, 135-137.)[5]

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[4] On August 21, 1990, at a time when LSC was governed by the 1990 recess appointments board, the Office of Management and Budget officially recognized the board as LSC's "head" in a notice published in the Federal Register. (J.A. 80.)

[5] Wilkinson's course of conduct is well-illustrated by the memoranda he routinely addressed to the "Board of Directors" and delivered to the 1990 and 1991 recess appointments boards. In these memoranda, Wilkinson stated outright, or otherwise made manifest, his belief that the recess appointments boards were the duly constituted "head" of LSC. (*See* J.A. 132-134, 135-137, 138-143, 144-148, 170-173, 174-178, 179-189.) As Wilkinson stated in a semiannual report issued a week after he filed his April 23, 1991 complaint:

> Structurally, the office [of Inspector General] has had four different "heads" for purposes of the IG Act . . . within a nine month period. These were: the last LSC president; an interim president; the 1990 LSC Board; and the current LSC Board. For a period of over two months, LSC had no head; the 1990 Board of Directors *ceased to exist when the terms of all its recess-appointed members expired* and a *replacement* board was not named until over two months later.

(J.A. 152) (emphasis supplied). Clearly, he viewed the recess boards as LSC "heads" for as long as they held their recess appointments.

1. Board Action Relating to Wilkinson's Employment.

One of the first matters addressed by the 1990 recess appointments board when it held its first meeting in February 1990 was the need to provide funds to establish Wilkinson's office and salary, as Wilkinson had been hired without Congressional funding.[6] The necessary funds, based on a proposed budget prepared and presented by Wilkinson himself, were allocated at the board's second meeting in March 1990, at which Wilkinson was present.[7]

The 1990 and 1991 recess appointments boards also provided Wilkinson with COLA increases in each of those two years. Both increases were beyond what he was entitled to receive under his employment contract. (A6-A7; J.A. 124, 355-356, 365-366.)[8] Wilkinson also received pension and insurance benefits as a result of recess board action. (A7, n.2; J.A. 355-366, 365-366.) Wilkinson

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[6] As LSC's president stated at the board's February 1990 meeting, Congress had mandated that LSC have an IG without appropriating funds to establish and maintain an IG's office. Noting that Mr. Wilkinson had been hired several months earlier without Congressional funding, LSC's president asked the recess board to allocate part of the "carry over" funds from FY 1989 to fund the establishment of the IG's office and salary. (LSC's Reply In Support of Its Submission of Supplemental Material filed in the D.C. Circuit Mar. 5, 1996 ("Reply Supp. Mat.") at 2-5 and Declaration of Victor Fortuno, Esquire Fortuno Decl., Item I at 54-55, 99-101, 116-119, 125, 133, 135-136, 153.)

[7] Reply Supp. Mat. at 4-5 and Fortuno Decl., Item 2 at 1-2, 126, 144-45 and 146.

[8] *See also* LSC's Supplemental Submission in Response to the Court's Post-Oral Argument Order filed in the D.C. Circuit Feb. 23, 1996 at 5-6 and Exhibit B; Reply Supp. Mat., Item 1 at 126-129.

accepted and retained his salary, COLA increases, and benefits without ever questioning the recess boards' power to provide them.[9]

2. Recess Board Action Relating to Wilkinson's Duties.

During his tenure, Wilkinson requested and received favorable action on numerous matters relating to his office, including:

- allocation of funding necessary to establish the IG's office and salary out of LSC's "carry over" funds (See n.6 *supra.*);
- establishment of the IG Oversight Committee to deal directly with Wilkinson as IG and to provide him with "ready access" to LSC's "head" as required by the IG Act, which was approved by a recess appointments board January 28, 1991 (J.A. 136, 174);
- appropriation of LSC funds for the OIG's budget, which included the board's March 1990 approval of a three-fold increase over Wilkinson's FY 1990 projected budget to enable him to expand the OIG's professional staff (J.A. 174-176); and
- personnel hiring authorization, an auditor for the OIG staff, and various memoranda of understanding governing relations between

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[9] Wilkinson, as well as LSC, consistently considered the recess appointments boards as his supervisor for personnel and employment matters. (J.A. 135-137, 139, 322-327, 344-345.) Moreover, Wilkinson's belief in this regard predated the OMB notice designating the board as LSC's "head" for purposes of the Inspector General Act. (J.A. 127-131, 132-134, 135-137.)

the OIG and various LSC departments (J.A. 138-143, 187, 265).

Wilkinson accepted the benefits of these favorable actions and spent the federal funds appropriated for the OIG by the recess appointments boards, without question or challenge to their authority to act. (J.A. 149-167, 175-176, 178.)

Of special note is Wilkinson's relationship with the IG Oversight Committee, an entity he asked the board to create. (J.A. 136.) Wilkinson routinely reported to and made requests of the Committee, including his presentation of several draft memoranda of understanding to govern relations between the OIG and LSC. (J.A. 136, 174, 179-185, 187.) He even recommended that the board expand the power and authority of the Committee to give it "substantial input into the IG's budget instead of having the IG communicate directly with [the board's Audit and Appropriation Committee]." (J.A. 175, 191, 197, 200.)

The Non-renewal of Wilkinson's Employment Contract.

On February 22, 1991, the 1991 recess appointments board, after considering the recommendation of the IG Oversight Committee that it would not be in LSC's best interest to renew Wilkinson's employment contract, voted unanimously, with one member abstaining, not to renew Wilkinson's employment contract for the year September 5, 1991 through September 5, 1992. Although Wilkinson has characterized this action as a "termination," it was not. The board gave Wilkinson the six months' notice required by paragraph 6 of the employment agreement. (J.A. 125, 197-200, 231-233, 234, 235-238.)

Procedural History

On April 23, 1991, Wilkinson filed a one count complaint against LSC under the Government in the Sunshine Act, 5 U.S.C. § 552b, seeking access to transcripts of closed executive sessions in which his employment was discussed. (J.A. 12-16.) On August 12, 1991, Wilkinson amended his complaint to challenge the recess appointments of the members of the board that voted not to renew his contract. (J.A. 17-30.) The United States intervened on the recess appointments issue. The district court agreed with Wilkinson on that issue and awarded him $224,600 in damages. (J.A. 100-106.)

LSC filed a motion for reconsideration, which was denied. LSC and the United States then filed timely appeals.[10] The United States Court of Appeals for the

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[10] LSC did not take a position on the recess appointments issue before the D.C. Circuit, arguing that regardless of the validity of those appointments, Wilkinson was barred from recovery either by the *de facto* officer doctrine or on equitable grounds. (A4.) As LSC explained at oral argument, the defense of this case was instituted under the direction of a board composed of President Bush's recess-appointees. By the time the case reached the appeal stage, however, LSC was governed by a board of confirmed directors appointed by President Clinton. The latter board recognized that reasonable minds have differed over the question of recess appointments, with four district court decisions on the subject – two of which involved LSC – evenly split. The board also recognized that no particular LSC board would ever be in a position to approach the issue free of questions of personal conflict due to the manner in which its own members had been appointed. Thus, the board elected to refrain from taking a position, asking that a decision be made to put the matter to rest and that Wilkinson, *in any case*, be denied recovery.

District of Columbia Circuit reversed and remanded. Relying on its decision in *Robertson v. F.E.C.*, 45 F.3d 486 (D.C. Cir. 1995) and the record of Wilkinson's conduct, the D.C. Circuit concluded that Wilkinson was estopped to challenge the board's authority to act for LSC by his receipt and acceptance of benefits from the board.

REASONS FOR DENYING THE WRIT

Petitioner fails to demonstrate grounds for review of the D.C. Circuit's decision, as it does not present a constitutional issue, an important question of federal law, or a conflict with the decisions of this Court or those of other Circuit Courts. To the contrary, the D.C. Circuit's decision properly avoided a constitutional issue by deciding the case on other grounds, and it did so by faithfully and correctly applying an estoppel doctrine long favored by this Court. Nonetheless, petitioner erroneously contends that (1) the D.C. Circuit's avoidance of the constitutional issue itself raises constitutional issues under Article III Section 2 ("case or controversy") and the First Amendment; (2) the D.C. Circuit's application of constitutional estoppel conflicts with the decisions of this Court and the other Circuit Courts; and (3) the D.C. Circuit's decision conflicts with this Court's recent decision in *Ryder v. United States*, 115 S. Ct. 2031 (1995).

A. The D.C. Circuit's Decision Does Not Raise A Constitutional Issue.

The D.C. Circuit properly avoided the only constitutional issue raised below – the validity of recess appointments to LSC's board – and thus its decision does not present a constitutional issue for review by this Court. Nonetheless, petitioner attempts to create a constitutional issue by contending that the D.C. Circuit, by failing to reach the recess appointment issue, breached its constitutional duty to decide a "case or controversy." He also contends that this alleged failure violated his first amendment right to petition the government. (Pet. at 16-18.)

Petitioner's first point simply ignores this Court's well-established rule that federal courts are obliged to avoid decisions on constitutional questions where a dispute can be resolved on non-constitutional grounds. *See, e.g., Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 445-46 (1988). There is neither a "duty" to decide a constitutional issue, simply because it has been presented, nor a "right" to have one decided. The D.C. Circuit adhered to that rule by properly agreeing with LSC that, *regardless* of the validity of recess appointments, petitioner is barred from recovery on equitable grounds.

Petitioner's second point ignores the record, which demonstrates that his right to petition the government and to "raise constitutional and statutory challenges" was given full play in this case. (Pet. at 17.)

B. The D.C. Circuit's Decision Is Not In Conflict With The Rulings of This Court or Other Circuits.

Wilkinson presented the D.C. Circuit with one of the paradigm situations for applying constitutional estoppel, *i.e.*, the person who requests favorable action from a body, but then seeks to avoid an unfavorable result by claiming, *post hoc*, that the body lacked authority to act at all. The particular facts of Wilkinson's case only strengthen the case for applying the doctrine: Wilkinson's status as an "insider" with statutory and fiduciary duties to report deficiencies to the board as LSC's inspector general; his repeated requests for and receipt of personal and official benefits over a nearly two-year period; his service over that period to the board without ever questioning its authority to act for LSC; and the fact that the board stands accused of nothing more than the good faith exercise of corporate power in the non-renewal of an employment contract. In sum, it is difficult to imagine a more suitable situation for the application of constitutional estoppel.

Nonetheless, Wilkinson contends that prior decisions of this Court have limited the doctrine to cases in which there have been (1) affirmative steps to obtain "unique" or "special benefits from a statutory scheme or program"; (2) a showing of substantial prejudice; and (3) a constitutional attack on the validity of a statute. (Pet. at 11-13.) Petitioner contends that (1) he was merely a "passive or incidental" recipient of benefits; (2) LSC was not prejudiced; and (3) he was not challenging the constitutionality of a statute. (*Id.*) Petitioner misstates the law, as well as the facts.

1. "Passive" Recipients of Benefits Are Not Exempted From the Doctrine of Constitutional Estoppel and, Even If They Were, Wilkinson Would Not Qualify As One.

Petitioner's contention that constitutional estoppel is limited to those who take "affirmative" steps to receive "special" or "unique" benefits fails for three reasons. First, he is raising this issue for the first time. Second, it is not supported by the law. Third, even if it were supported by the law, it is not supported by the facts.

First, petitioner did not raise this issue before the D.C. Circuit. He cannot raise it now for the first time.[11] *Delta Airlines v. August*, 450 U.S. 346, 362 (1981) ("question presented in petition but not raised in court of appeals is not properly before us.")

Second, it simply is not the case that "passive or incidental" recipients of benefits are exempted from the doctrine. The principle is illustrated by *Arnett v. Kennedy*, 416 U.S. 134 (1974), the only employment discharge case cited by petitioner, and one he sponsors as an exemplar of the "traditional" application of the doctrine that allegedly has been ignored by the D.C. Circuit. (Pet. at 12, n.9.) Kennedy was a non-probationary federal employee who had been discharged by his supervisor pursuant to the terms and procedures of a federal statute. The statute permitted discharge only on grounds of cause. Where

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[11] In his post-oral argument brief, petitioner's only argument against application of the doctrine was that "his employment was in no way traceable to any action of the recess appointments board." Post-Argument Memorandum for Appellee filed in the D.C. Circuit, February 23, 1996, at 9.

discharge occurred, the statute required that the employee be given written notice and an opportunity to respond in writing, but without a trial-type hearing. Kennedy filed suit, contending that the absence of a trial-type hearing violated his constitutional right of due process. A three-judge district court panel agreed. On direct appeal, this Court reversed, noting that Kennedy was seeking to "bifurcate" the statute so that he could retain the benefit of its "for cause" restriction on discharge, while avoiding the burden of its discharge procedure. 416 U.S. at 153-154. As this Court concluded, Kennedy "must take the bitter with the sweet." (*Id.*) In reaching this conclusion, this Court took no note of Kennedy being a "passive or incidental" recipient of any "special" or "unique" benefit afforded him by the statute, nor had Kennedy done anything "affirmative" to obtain that benefit, which was bestowed by operation of the statute on all non-probationary federal employees based solely on their status. *See also Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 323 (1935) ("[O]ne who *accepts* the benefits of a statute cannot be heard to question its constitutionality") (emphasis supplied).

If, as petitioner suggests, *Arnett* represents the "traditional" application of the doctrine, the D.C. Circuit's application in this case is firmly within that tradition. The recess board's employment decisions conferred benefits and burdens upon LSC's employees in the same "passive or incidental" sense as did the statute in *Arnett*. As Kennedy was estopped from challenging the source of the burden of which he complained, *i.e.*, the statute, by his "passive" receipt of the statute's benefit, so, too, is Wilkinson estopped from challenging the source of the burden he complained of, *i.e.*, the board's power to act for

LSC, by his "passive" receipt of the benefits of the board's earlier actions on behalf of LSC.[12]

In relying on *Arnett*, petitioner also fails to take account of the fact that it belongs to a category of cases that is readily distinguishable from his situation, as it deals with benefits obtained under a statute. Such benefits often are obtained "passively," as one may need do nothing more than be subject to the statute. Another category of cases, challenges to actions by regulatory bodies, provides a closer analogy to Wilkinson's case. This Court has applied constitutional estoppel to such

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[12] *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 456-457 (1988), also relied upon by petitioner, is distinguishable from both *Arnett* and this case on the ground that the statute under challenge in *Kadrmas* imposed a burden upon the petitioner without any "apparent" benefit. *Id.* at 457. Thus, the petitioners were not seeking to retain benefits while avoiding burdens, as is the case with Wilkinson. *See also Thompson v. Consolidated Gas Utilities Corporation*, 300 U.S. 55, 81 (1936) (petitioners not subject to estoppel, as they "do not assert rights under the statute they assail."); *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752, 768-769 (11th Cir. 1991) (non-minority contractor not estopped from challenging constitutionality of DOT regulations benefiting minority contractors as the regulations were not intended to benefit, and there was no showing that they did benefit, the non-minority contractor); *Brockert v. Skornicka*, 711 F.2d 1376, 1380 (7th Cir. 1983) (municipal employee who was denied a waiver from municipal residency policy, where waiver had been granted in the past, was not seeking simultaneously to retain a benefit while avoiding a burden); *Spaulding v. Douglas Aircraft Co.*, 154 F.2d 419, 422 (9th Cir. 1946) (subcontractor not estopped from challenging constitutionality of statutory provision where validity of the provision affects only subcontractor's performance obligations under a private contract with prime contractor and not its rights under the statute).

challenges according to a simple equitable principle: one who has "invoked" or "procured" action by a body "may not later, when dissatisfied with the result, assail [that] action" on constitutional grounds. *United Gas Co. v. Railroad Comm. of Kentucky*, 278 U.S. 300, 308 (1928) (estoppel applied to gas producer who unsuccessfully petitioned state regulatory commission for rate increase) (citations omitted). *See also Spaulding v. Douglas Aircraft Co.*, 154 F.2d 419, 422 (9th Cir. 1946). Application of the doctrine in these cases does not require receipt of a benefit at all, let alone a "unique" or "special" one. What is required is that action be "invoked" or "procured," and for the reasons set forth above, petitioner clearly has done so.

Finally, and from a factual perspective, Wilkinson was anything but a "passive or incidental" recipient of benefits. Contrary to his assertions, Wilkinson "invoked" and "procured" actions by the recess appointments boards in routine fashion, including presentation of a budget for the establishment of his office and salary.[13] In addition to personal benefits, Wilkinson requested and received a variety of benefits related to his official duties, which also may be considered.

2. Petitioner's "Prejudice" Argument Is Legally and Factually Mistaken.

Petitioner contends that the D.C. Circuit overlooked what he contends is an important limitation on the doctrine of constitutional estoppel, a finding of substantial

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[13] Wilkinson certainly knew that the budget would be acted upon by a board of recess appointees.

prejudice or change of position based on "anything Petitioner did actively, or passively." (Pet. at 13, citing *Ashwander*, 297 U.S. at 323.) Petitioner's contention is erroneous.

First, *Ashwander* is distinguishable on its facts, as it concerned a shareholder derivative action and took into account the conduct of the respondent corporation, not the petitioner. Second, the D.C. Circuit expressly noted LSC's substantial prejudice and change of position in its opinion. *See also Robertson v. F.E.C.*, 45 F.3d 486 (D.C. Cir. 1995) (applying doctrine where benefit obtained was matching funds for a presidential campaign wherein personal use of the funds would have been illegal).

Third, LSC's prejudice clearly flowed from petitioner's active conduct, including (a) advising the recess appointments boards that he considered them to be the legitimate "head" of LSC; (b) treating those boards as LSC's legitimate "head" by submitting to them his official annual reports, proposed budgets (through LSC's president), and other requests for favorable budgetary and other action; and (c) retaining the salary, COLA increases, and benefits paid to him without complaint (which does not seem to LSC to be at all "passive"). Based on these actions, the recess appointments boards allocated funds for Wilkinson's office, salary, COLA increases, and insurance benefits. They also took the step of voting not to renew his contract. Had Wilkinson advised the recess appointments boards that he believed they lacked authority to act for the corporation, they could have avoided the allocation and payment of funds for his office, salary, COLA increases, and benefits, as well as the other actions he requested. The 1991 recess appointments board could

have avoided the non-renewal of petitioner's contract and this long and costly lawsuit.

3. Petitioner's Contention That the Doctrine Is Limited To Constitutional Attacks On the Validity of Statutes Is Mistaken.

Petitioner attempts to distinguish his circumstance from virtually all applications of constitutional estoppel by contending that his attack on the unfavorable employment action is based upon his reading of the requirements of the LSC Act, as opposed to a challenge to the validity of the Act itself. Petitioner's argument is semantical, at best, presenting a distinction without a difference.

First, petitioner's lawsuit sought to invalidate board action by challenging the validity of President Bush's recess appointments, arguing in effect that the President had exceeded his constitutional authority in making them. There is no functional difference between that challenge and the one in *Robertson v. F.E.C.*, in which the petitioner also relied upon allegedly unconstitutional appointments to attempt to invalidate a specific unfavorable agency action. Just as there is no functional distinction between the two cases, there is no basis for treating them differently with respect to the application of the doctrine of constitutional estoppel. The point of the doctrine – to prevent someone from simultaneously retaining benefits while avoiding burdens – is equally well-served in both cases.

Second, assuming *arguendo* that the absence of a constitutional attack on a statute (as opposed to appointments) is a substantive distinction, such that it may not

fairly be called "constitutional," the argument proceeds no farther than nomenclature. As the D.C. Circuit noted, "constitutional estoppel is just one application of the estoppel concept, a branch of equity." *Id.* at A6.

C. The D.C. Circuit's Decision Does Not Conflict With This Court's Decision in *Ryder v. United States*.

Petitioner concedes that there is no conflict between the D.C. Circuit's decision and *Ryder v. United States*, 115 S. Ct. 2031 (1995) on the only issue they have in common – application of the *de facto* officer doctrine. (Petition at 15.) Nonetheless, he contends that the D.C. Circuit "missed the fundamental point" of *Ryder*:

> one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation has indeed occurred. Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments.

Petition at 15, *quoting Ryder*, 132 L.Ed.2d at 143. Petitioner argues that the D.C. Circuit's decision creates a disincentive to raise challenges to appointments, and that it places people like himself in the position of having to return or refuse their salaries in order to raise the challenge. The distinctions between this case and *Ryder* overwhelm petitioner's contentions.

First, the passage quoted from *Ryder* by petitioner concerned the *de facto* officer doctrine, a defense on the

merits. Petitioner's attempt to stretch that passage to include constitutional estoppel ignores the purpose of an estoppel defense, which is to preclude a party from raising a claim or issue, *regardless of its merits*, because it would be inequitable to permit that person to obtain relief.

Second, the *Ryder* case lacked the aspects of conduct and relationship presented in this case. Ryder was a criminal defendant challenging the appointment of particular appellate judges *before* they acted. He had no prior relationship with those judges, had never accepted or acknowledged their authority, and had never requested or received any benefits from them. In sum, there was nothing inequitable about his conduct *vis-a-vis* those whose power to act he questioned. By contrast, Wilkinson was an official of LSC, an "insider," challenging the appointments of two boards of directors he had served for nearly two years. Like Ryder, Wilkinson should have raised the recess appointments issue at the very outset, not after favorable action ceased and a burden was imposed.[14]

Finally, *Ryder* should not be used to create litigation "incentives" for an Inspector General, with a statutory, as

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[14] Petitioner asserts that it will place people in an uncomfortable "bind" if they must bring early challenges or forego benefits, like salary, in order to avoid an estoppel defense. (Petition at 16.) But what he is really suggesting is that people be permitted to behave inequitably, to draw benefits until such time as they can determine "whether litigation is really necessary," *i.e.*, until benefits cease and burdens begin and litigation becomes "necessary" to avoid them. (*Id.*) That is not what Ryder did, and it is not what *Ryder* protects.

well as a fiduciary, duty to bring defects to the attention of the board for the good of the corporation. To the contrary, estopping Wilkinson serves the important federal policy of barring officials hired to investigate governmental operations from using information they gather through their employment for personal gain via litigation.[15] It sends the wrong message to allow an inspector general to collect $224,000, plus attorneys fees, from the very organization he was sworn to serve, especially where he filed his lawsuit while he was still inspector general.

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[15] *See United States, ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1990), *cert. denied*, 499 U.S. 921 (1991), *reh'g denied*, 501 U.S. 1270 (1991) (quality assurance specialist for U.S. government did not qualify as "original source" for purposes of bringing Qui Tam action, as it was a responsibility and condition of his employment to uncover fraud). *See also United States ex rel. Fine v. University of California*, 72 F.3d 740, 742-745 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1877 (1996) (fact that former auditor for Inspector General was employed specifically to report fraud was sufficient to render his disclosures non-voluntary and, thus, he was not an "original Source" for purposes of false claims act).

CONCLUSION

Petitioner has failed to demonstrate grounds for review of the D.C. Circuit's decision in this case. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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